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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 294.

ROBBINS COAL COMPANY, INC.,
Petitioner,

vs.

FIREMEN'S INSURANCE COMPANY OF NEWARK,
NEW JERSEY,
Respondent.

BRIEF

Of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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QUESTION PRESENTED.

Petitioner states that the sole question presented is whether the evidence was sufficient to take to the jury the question of whether the fall of the coal bins of petitioner had been caused by a landslide within the coverage of the casualty insurance policy issued to the petitioner by respondent.

Respondent agrees that this was the sole basis of the decision of the Court of Appeals, but points out that it is impossible to consider this question here, because the entire record in the Court of Appeals is not before this Court.

STATEMENT OF THE CASE.

It is impossible to state the facts in this case because the entire record is not before this Court. The most important evidence in the case consisted of numerous photographs made soon after the collapse of the coal storage bins. These photographs were introduced by both the petitioner and respondent and were unimpeached. The court below referred to these photographs in its opinion and at the outset recognized the difficulty of even outlining the contentions of the parties without photographs or drawings.[1] Further, the court below noticed that photographs had been taken after this casualty showing both the I-beams supporting the bins and the I-beam supporting the conveyor structure badly twisted and bent in the direction of the fall.[2] And then the court observes that its opinion is rested in substantial part upon a careful examination of these photographs.[3]

The record below showed that there were forty-four photographs in evidence, and other documentary evidence, all of which are absent,[4] and manifestly, without these photographs before this Court it is impossible to state the evidence upon which the decision of the court below was rested.

The failure to have these exhibits certified to this Court is in violation of the mandate of Rule 21 of this Court.

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[1] Petition, p. 14.

[2] Petition, p. 15.

[3] Petition, p. 21.

[4] R. 615-618.

SUMMARY OF ARGUMENT.

This case involves merely the sufficiency of the evidence to warrant submission to the jury of the question of whether the petitioner's coal bins collapsed as a result of a landslide.

The only reason suggested by petitioner for the granting of the writ is that the decision below is in conflict with decisions of courts of appeal of other circuits as well as decisions of this Court. A careful examination of the authorities cited by petitioner, however, together with a careful examination of the petition reveals that the petitioner's argument is not with the rules of law pronounced by the court below, but merely with the court's interpretation and analysis of the evidence.

This case does not involve construction of a Federal statute, or a constitutional question, or a conflict between courts of appeal, or a question of public interest. It is important to the parties and no other.

The opinion of the court below indicates a comprehensive study of the record in this case and a perceptive analysis of the issues.

This Court has on a number of occasions stated that certiorari is inappropriate where the petitioner seeks merely to review evidence and inferences therefrom: **Southern Power Company v. North Carolina Public Service Co.**, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413; **United States of America v. James J. Johnston**, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925; **General Talking Pictures Corporation v. Western Electric Company, Inc., et al.**, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849. And see **Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443;

Dick v. New York Life Ins. Co., 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921; **Michalic v. Cleveland Tankers, Inc.**, ... U. S. ..., 5 L. Ed. 2d 20, 81 S. Ct. ...; **Sentilles v. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173; **Wilkerson v. McCarthy et al.**, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497; **Annotation**, 4 L. Ed. 2d 1787, 1790, Footnotes 19 and 20.

ARGUMENT.

This Case Involves Merely a Review of the Evidence and Is, Therefore, Not an Appropriate One for Review by Certiorari.

Pretermitting the question of whether the entire record is before this Court, we shall consider the propriety of the Court's weighing the evidence in this case on the assumption that the record was before the Court.

At a time when the docket of this Court is burdened with cases of vital public and governmental interest, the Court has been asked to spend countless hours reviewing a record consisting of six hundred nineteen pages, numerous photographs, diagrams and other exhibits, and decide whether the Court of Appeals correctly concluded that there was insufficient evidence in this case to warrant submission to the jury of the question of whether the petitioner's coal bins collapsed as a result of a landslide. It is respectfully suggested that this is not an appropriate case for review in this Court by certiorari.

The only reason suggested by petitioner for the granting of a writ of certiorari is that the decision of the court below is in conflict with numerous decisions of courts of appeal of other circuits as well as decisions of this Court.[1]

A cursory examination of the petition might indicate that this is true, but a careful examination of the petition and the authorities cited therein makes it very clear that the petitioner seeks merely to review the evidence in this Court. The petitioner, appellee below, filed a petition for a rehearing and a brief and argument in support of the petition, and the first statement in the argument is:

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[1] Petition, p. 5.

"The appellee does not question the soundness of the principles of law stated in the opinion. The opinion (page 12) aptly refers to said principles as 'legal formulas with which all agree.' "

The cases cited in the petition which are alleged to be in conflict with the decision below are merely cases where the Court has reviewed the sufficiency of the evidence under the peculiar circumstances before the Court to warrant submission to the jury. They contain no rules of law contrary to those applied to this case by the court below.

There is nothing whatsoever that distinguishes the case at bar from the thousands of cases in which a judgment has been directed for the defendant because of insufficiency of the evidence. It does not involve construction of a Federal statute, or a constitutional question, or a conflict between courts of appeal, or a question of public interest. Granting certiorari would merely afford petitioner a "second appeal" and a second review of the evidence.

Counsel for respondent were impressed upon reading the opinion by the Court of Appeals in this case, as we think this Court will be, that the court demonstrated a familiarity with the entire record and an unusually perceptive grasp of the problems involved.

It would be presumptuous of counsel for respondent to attempt to outline the many reasons for denying certiorari where the petitioner seeks merely to review the evidence and inferences therefrom—the Court itself is intimately familiar with them and has considered them at length on many occasions. We shall, however, call to the Court's attention some of the cases in which the propriety of such a review has been considered.

Southern Power Company v. North Carolina Public Service Co., 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924),

was before the Court on writ of certiorari to the United States Court of Appeals for the Fourth Circuit to review a judgment modifying the judgment of the District Court in a proceeding to compel the furnishing of electric current and power for certain public use. During the argument in this Court it developed that the controverted question was whether the evidence sufficed to establish actual dedication of petitioner's property to public use. Mr. Justice McReynolds, speaking for the Court, noted that this was primarily a question of fact, and that was not the ground upon which certiorari was granted, and had it been sufficiently developed would not have moved the Court to grant the writ. The writ was dismissed.

United States of America v. James J. Johnston, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925), was before the Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review a judgment reversing a judgment of the District Court convicting defendant of violation of the provisions of the Internal Revenue Act requiring payment of tax on fees exacted for admission to a theatre. Mr. Justice Holmes, speaking for a unanimous Court, said:

> "We do not grant a certiorari to review evidence and discuss specific facts."[1]

General Talking Pictures Corporation v. Western Electric Company, Inc., et al., 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849 (1938), was before the Court on writ of certiorari to the Circuit Court of Appeals for the Second Circuit. Three suits had been brought in the District Court by respondents to restrain patent infringements. The lower court had held that six of the patents were valid and had been infringed by the petitioner. One of the questions which the petitioner sought to have reviewed by this Court

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[1] P. 227 U. S., 926 L. Ed.

was whether the respondents acquiesced in the infringement and were thereby estopped. The Court said that this depended on the facts and that "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it."[1]

Various members of this Court have from time to time set forth at length the basic reasons underlying the doctrine that this Court should not grant certiorari merely to review evidence and inferences therefrom: **E. g., Rogers v. Missouri Pacific R. Co.**, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443 (opinion of Mr. Justice Harlan, in which Mr. Justice Burton concurred, appearing at page 559 U. S. and 517 L. Ed.; opinion of Mr. Justice Frankfurter appearing at page 524 U. S. and at page 520 L. Ed.); **Dick v. New York Life Insurance Company**, 359 U. S. 437, 3 L. Ed. 2d 935, 79 S. Ct. 921 (opinion of Mr. Justice Frankfurter, in which Mr. Justice Whittaker joined, appearing at page 447 U. S. and 943 L. Ed.); **Michalic v. Cleveland Tankers, Inc.**, ... U. S. ..., 5 L. Ed. 2d 20, 81 S. Ct. ... (opinion of Mr. Justice Frankfurter appearing at page 26 L. Ed.; opinion of Mr. Justice Harlan, in which Mr. Justice Whittaker and Mr. Justice Stewart joined, appearing at page 26 L. Ed.); **Sentilles v. Inter-Caribbean Shipping Corp.**, 361 U. S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 (concurring opinion of Mr. Justice Stewart appearing at page 111 U. S., p. 145 L. Ed., with which Mr. Justice Harlan concurred; dissenting opinion of Mr. Justice Frankfurter appearing at page 111 U. S., p. 146 L. Ed.); **Wilkerson v. McCarthy et al.**, 336 U. S. 53, 69 S. Ct. 413, 93 L. Ed. 497 (concurring opinion by Mr. Justice Frankfurter at page 64 U. S., p. 506 L. Ed., with whom Mr. Justice Burton joined). See, also, cases collected in **Annotation**, 4 L. Ed. 2d 1787, 1790, footnotes 19 and 20.

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[1] P. 178 U. S., 1275 L. Ed.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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APPEARANCE OF COUNSEL FOR RESPONDENT.

The Clerk will enter my appearance as counsel for the respondent.

Dated: ....., 1961.

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George W. Yancey,
Address: 1103 Comer Building,
Birmingham 3, Alabama.

Affidavit of Service.

State of Alabama, }
Jefferson County. }

Before me, Hazel Hitchcock, the undersigned Notary Public in and for said County, in said State, personally ap-

peared Emmett R. Cox, who, being known to me and being by me first duly sworn, deposes and says on oath as follows: That he has personally served a copy of the above and foregoing Brief for Respondent upon Honorable Douglass P. Wingo, counsel of record for petitioner, by delivering a copy thereof to him at his office, or to a clerk in his office, at 1115 First National Building, Birmingham, Alabama; and that he has served a copy of the above and foregoing Brief for Respondent upon Honorable John S. Foster and Graham, Bibb, Wingo and Foster, of counsel for petitioner, by delivering a copy thereof to them at their office, or to a clerk in their office, at 1115 First National Building, Birmingham, Alabama, on this the ..... day of ....., 1961.

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Sworn to and subscribed before me this ..... day of ....., 1961.

.....

Notary Public.